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No. 90-1226

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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM HOPE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the gun seized in a search incident to petitioner's arrest should have been suppressed because of his claim that the arrest was without probable cause and was a pretext for the search.

2. Whether the court of appeals correctly applied Illinois law in determining that petitioner had three previous felony convictions for purposes of sentence enhancement under 18 U.S.C. 924(e)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 906 F.2d 254.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1990. A petition for rehearing was denied on October 19, 1990. Pet. App. 19a-20a. The petition for a writ of certiorari was filed on December 21, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

of possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to a term of 30 years' imprisonment under 18 U.S.C. 924(e)(1). The court of appeals affirmed. Pet. App. 1a-18a.

1. At about 1:15 a.m. on September 3, 1987, three Chicago police officers, who were assigned to a unit that concentrated on gang activities and narcotics, stopped petitioner's car for a traffic violation. Petitioner was known to the officers as a leading gang member, and, as a result of a computer check about one week earlier, the officers knew that petitioner's driver's license had been suspended. The officers stopped the car when they recognized petitioner as the driver. When petitioner stated, in response to the officers' question, that he could not produce a valid driver's license, they arrested him. In a routine search of the interior of petitioner's car incident to that arrest, the officers found a bullet and a battery casing. When they tried to move the battery casing, its top came off, exposing a loaded .38 revolver. Pet. App. 1a-2a; Gov't C.A. Br. 4-6, 10.

2. a. Petitioner moved to suppress the gun on the ground that he had been arrested without probable cause. The district court denied that motion. The court found that no hearing was necessary because petitioner had failed to make adequate factual allegations in support of his claim. On the merits, the court concluded that the police had probable cause to arrest petitioner because they knew he was driving while his license was suspended, a misdemeanor under Illinois law. Memorandum Order, No. 88 CR 298 (N.D. Ill. July 27, 1988).

b. Under 18 U.S.C. 922(g)(1), a person previously convicted of a felony may not possess a firearm. Under 18 U.S.C. 924(e)(1), if a felon is convicted of illegal possession of a firearm, he is subject to sentence enhancement if he has "three previous convictions by any court * * * for

a violent felony or a serious drug offense."[1] The term "violent felony" is defined to include any burglary punishable by imprisonment for a term exceeding one year. 18 U.S.C. 924(e)(2)(B). See *Taylor* v. *United States*, 110 S. Ct. 2143 (1990). To support sentence enhancement for petitioner, the government introduced into evidence three prior convictions, including a 1975 conviction for burglary in violation of Illinois law. Pet. App. 8a-9a.

Before sentencing, petitioner raised several challenges to the use of the 1975 burglary conviction to enhance his sentence, all of which were rejected by the district court. Gov't C.A. Br. 27 n.14. At the sentencing hearing, petitioner raised another objection to the use of the 1975 conviction, claiming that he was not the person convicted of that crime. S. Tr. 405-406, 588-590. In response, the government introduced a certified statement of conviction from the state court reciting that petitioner had pleaded guilty to the burglary, that a judgment of conviction had been entered, and that petitioner had been sentenced to a drug rehabilitation program.[2] The government also introduced fingerprint evidence and a criminal arrest history to establish that petitioner was the person convicted of the burglary. The district court rejected petitioner's challenge to the use of the 1975 conviction and imposed an enhanced sentence pursuant to 18 U.S.C. 924(e)(1). Pet. App. 9a-10a; S. Tr. 410-422, 596-597; Gov't C.A. Br. 28.

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[1] Although the version of 18 U.S.C. 924(e) in force when petitioner was sentenced was amended in certain respects by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7056, 102 Stat. 4402, those amendments are not relevant here.

[2] The certified statement of conviction indicated that petitioner had entered a plea of guilty and that "judgment was entered on the conviction and the defendant was sentenced * * * to Illinois [Department of] Corrections for a term of not less than three (3) years, nor more than nine (9) years. Defendant sentenced to the Drug Abuse Program thru Gateway House." Pet. App. 9a.

3. The court of appeals affirmed. Pet. App. 1a-18a. It first rejected petitioner's claim that his arrest was pretextual and unsupported by probable cause. *Id.* at 4a-5a. The court dismissed petitioner's argument, advanced for the first time on appeal, that the validity of the arrest should turn on an inquiry into the actual motives of the arresting officers, to determine whether the arrest was pretextual. The court pointed out that "the test in this circuit has been, and remains, purely an objective one." *Id.* at 4a. An arrest satisfies Fourth Amendment requirements, the court explained, "so long as the arresting officer possesses sufficient information to give him probable cause to arrest * * * and is authorized by law to effect a custodial arrest for the particular offense." *Ibid.* Applying that test, the court concluded that petitioner's arrest was valid because the arresting officers had probable cause to believe that petitioner had violated state traffic laws, and because there was nothing in the record to indicate that the officers were not authorized to make the arrest. Because those conditions were satisfied, the court stated, the arrest was valid without regard to the police officers' subjective motives. *Id.* at 5a.

The court next rejected petitioner's contention, also raised for the first time on appeal, that the burglary offense to which he had pleaded guilty in 1975 did not produce a "conviction," as that term is used in 18 U.S.C. 924(e)(1). Pet. App. 9a-12a. Petitioner first claimed that the state court sentencing transcript and certain related orders that were not in the record revealed that the drug rehabilitation program to which he was sentenced had been offered to him as an alternative to conviction. The court rejected that contention. Although taking judicial notice of the sentencing materials on which petitioner relied, the court concluded that the certified statement of conviction accurately reflected the outcome of the 1975 sentencing proceedings as culminating in a conviction. *Id.* at 10a n.1.

Petitioner also contended that no conviction had resulted as a matter of law, because the sole purpose of the Illinois Dangerous Drug Abuse Act, Ill. Rev. Stat., ch. 91 1/2 (1973), pursuant to which he was sentenced, was to provide rehabilitative treatment to drug addicts in lieu of prosecution. After an extensive review of Illinois authorities, the court of appeals found to the contrary. It agreed with petitioner that state law governs the question of what constitutes a conviction. Pet. App. 11a n.3. But it concluded that after petitioner had withdrawn his plea of not guilty, he had been sentenced to a drug treatment program in lieu a term of imprisonment. The court explained that the Illinois statute defining the term "conviction" provides that a "'conviction' means a judgment of conviction *or* sentence entered upon a plea of guilty." Pet. App. 11a-12a, quoting Ill. Rev. Stat., ch. 38, para. 2-5 (1962); Ill. Rev. Stat., ch. 38, para. 1005-1-5 (1973). Under that provision, petitioner's sentence, upon his plea of guilty, qualified as a conviction.[3]

ARGUMENT

1. Petitioner renews his contention (Pet. 17-36) that his arrest was invalid because of his claim that the arrest was a pretext to conduct a search and was not based on probable cause. That contention does not warrant this Court's review.

Both courts below concluded that the arresting officers had probable cause to arrest petitioner because he was

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[3] Petitioner also challenged the sufficiency of the evidence, Pet. App. 5a-6a, attacked the admissibility of his stipulation to a prior felony conviction for deviate sexual assault, *id.* at 6a-8a, made several other claims against his sentence enhancement, *id.* at 12a-15a, and raised an ineffective assistance of counsel claim, *id.* at 15a-17a. The court of appeals rejected each contention, and petitioner does not renew those claims here.

driving while his license was suspended, in violation of state law. The district court found that petitioner's challenge to the existence of probable cause was so vague as not to require a hearing. In any event, the court found the existence of probable cause to be "inescapable." Memorandum Order, No. 88 CR 298 (N.D. Ill. July 27, 1988).[4] Likewise, after analyzing petitioner's objections, the court of appeals found sufficient justification for the arrest based on petitioner's traffic violation. Pet. App. 3a. In this Court, petitioner attacks the findings below based on a convoluted description of the record that boils down to the assertion that the officers' testimony was "self-serving" (Pet. 27), and differed in some respects from their arrest reports (Pet. 23-26). Petitioner's quarrel with the findings of the lower courts on the probable-cause issue, however, does not warrant this Court's attention. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner also contends (Pet. 18-19) that his arrest was invalid because, according to him, the arresting officers used the traffic stop as a pretext to search for incriminating evidence. Petitioner does not contend that the subjective motives of the police for making an arrest should be examined to determine whether a probable-cause arrest was pretextual. Rather, he argues that an arrest is invalid, even if supported by probable cause, where "a reasonable officer

[4] The court's order states (at 2): "[Petitioner] states nothing more than that his arrest was without probable cause. [Petitioner's] boilerplate motion does not address the fact that the arresting officers knew him and were aware his driver's license was suspended. According to Ill. Rev. Stat., ch. 95 1/2 § 6-303 (1973), driving while a license is suspended or revoked is a Class A misdemeanor. As such, the conclusion that the officers possessed probable cause to arrest [petitioner] is inescapable."

would * * * [not] have made the arrest, absent invalid purposes." Pet. 19.

The court of appeals correctly held that the validity of a probable-cause arrest does not turn on the motives of the arresting officers. In *Scott* v. *United States*, 436 U.S. 128, 137-138 (1978), this Court made clear that police conduct is to be judged, for Fourth Amendment purposes, "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved." The Court has since applied an objective analysis in many other Fourth Amendment contexts. For example, in *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584 n.3 (1983), the Court rejected a claim that the boarding of a boat by customs officers under a statute authorizing inspection of ship's documents was improper because it was motivated by intent to apprehend drug smugglers. Similarly, in *Maryland* v. *Macon*, 472 U.S. 463, 470-471 (1985), the Court rejected a claim that undercover officers' purchase of obscene materials with marked money constituted a warrantless seizure because the officers intended to retrieve the money for use as evidence. See also *Horton* v. *California*, 110 S. Ct. 2301, 2308-2309 (1990) (rejecting claim that the warrantless seizure of evidence in plain view is invalid if the discovery of the evidence is not inadvertent; "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); *Graham* v. *Conner*, 490 U.S. 386, 397 (1989) (applying objective standard of reasonableness to excessive force claim; the "underlying intent or motivation" of the officers is irrelevant). Under the principles of those cases, petitioner's pretext argument must fail. When the facts and reasonable inferences available to the arresting officers establish probable cause for an arrest, the requirements of the Fourth Amendment are satisfied and the arrest may not be chal-

lenged on the ground that it would not have occurred absent an improper motive.[5]

A majority of the courts of appeals that have considered the issue of pretext arrests have so held. See, *e.g.*, *United States* v. *Cummins*, 920 F.2d 498, 501 (8th Cir. 1990) (An "otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity. * * * [T]he stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions"); *United States* v. *Trigg*, No. 90-1216 (7th Cir. Feb. 27, 1991), slip op. 3 ("it is sufficient that the officer had probable cause to arrest and that he lawfully effectuated the arrest"; reaffirming its prior decision in the same case, *United States* v. *Trigg*, 878 F.2d 1037, 1038-1042 (7th Cir. 1989));[6] *United States* v. *Hawkins*, 811 F.2d 210, 214 (3d

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[5] The contention that a "pretext" limitation is necessary in order to constrain the arbitrary exercise of police discretion misses the point that the requirement of probable cause itself imposes a sufficient restraint on police discretion for Fourth Amendment purposes. Petitioner errs in relying (Pet. 33) on inventory-search cases such as *Colorado* v. *Bertine*, 479 U.S. 367 (1987), and *Florida* v. *Wells*, 110 S. Ct. 1632 (1990), for the proposition that a probable-cause arrest must also conform with the standardized practice of a "reasonable officer." Inventory searches are justified not by probable cause, but by administrative concerns accompanying police custody over a person and his possessions. Because of the absence of probable cause, a standardized policy is necessary to ensure that inventory searches serve those administrative concerns rather than allowing "a general rummaging in order to discover incriminating evidence." *Wells*, 110 S. Ct. at 1635.

[6] Petitioner asserts (Pet. 35-36) that the decisions in *Trigg* and this case conflict with the decision in *United States* v. *Lewis*, 910 F.2d 1367 (7th Cir. 1990). Quite apart from the fact that the claimed intracircuit conflict would not warrant this Court's review, *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957), petitioner is wrong. *Lewis*, which rejected a pretext-arrest claim as to a traffic stop made by officers

Cir.) ("a seizure that is valid based upon the stated purpose cannot be challenged on the grounds that the seizing officers were in fact motivated by an improper purpose"), cert. denied, 484 U.S. 833 (1987); *United States* v. *Causey*, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc) ("in a case where the officers have taken no action except what the law objectively allows their subjective motives in doing so are not even relevant to the suppression inquiry").[7]

One circuit has taken a different approach.[8] In *United States* v. *Guzman*, 864 F.2d 1512 (10th Cir. 1988), the court

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attached to a gang-crimes unit, is consistent with other Seventh Circuit cases.

[7] In *Causey*, 834 F.2d at 1184, the en banc court overruled the "pretext" holdings of *United States* v. *Cruz*, 581 F.2d 535 (5th Cir. 1978) (en banc), and *Amador-Gonzalez* v. *United States*, 391 F.2d 308 (5th Cir. 1968). Petitioner's reliance (Pet. 22, 28) on those authorities is therefore misplaced.

[8] Although the Ninth Circuit in *United States* v. *Smith*, 802 F.2d 1119, 1124 (1986), stated in dictum that an improper motive on the part of a law enforcement officer can invalidate an otherwise valid probable-cause arrest, the court concluded that the arrest before it was entirely proper. To our knowledge, no subsequent Ninth Circuit decision has found an arrest to be invalid on pretext grounds. See *United States* v. *Espinosa*, 827 F.2d 604, 609 (9th Cir. 1987) (considering pretext issue and finding no violation), cert. denied, 485 U.S. 968 (1988). Because the suggestion in *Smith* of a pretext exception rested entirely on cases decided prior to this Court's decision in *Scott* v. *United States*, see 802 F.2d at 1124 (citing, *inter alia*, *United States* v. *Lefkowitz*, 285 U.S. 452, 467 (1932), and *Taglavore* v. *United States*, 291 F.2d 262 (9th Cir. 1961)), and because the court did not have the benefit of more recent circuit decisions rejecting pretext claims, we do not believe the Ninth Circuit can be viewed as having firmly adopted a pretext rule.

The Eleventh Circuit has concluded that an investigative stop based on reasonable suspicion is invalid as a pretext where "a reasonable officer *would* [not] have made the seizure in the absence of illegitimate motivation." *United States* v. *Smith*, 799 F.2d 704, 708 (1986). But because there was no probable cause for an arrest in that case, the court

expressed the view that "the pretextual use of police power may violate the Fourth Amendment." *Id.* at 1517. Although agreeing with the consensus view of courts and commentators that "an objective analysis of the facts and circumstances of a pretextual stop is appropriate, rather than an inquiry into the officer's subjective intent," *id.* at 1515, the court stated that in evaluating whether a stop was pretextual, a court should ask "not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." *Id.* at 1517.[9]

Although *Guzman*'s analysis departs from that applied by other courts of appeals, we do not believe that review of the pretext issue is warranted here. Even under the approach adopted in *Guzman*, petitioner would not prevail

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in *Smith* did not address the different issue, presented here, of "when, if ever, a stop for probable cause resulting from an observed traffic violation might be invalid as pretextual." *Id.* at 709. Subsequent Eleventh Circuit cases have continued to leave that issue open. See *United States* v. *Dunkley*, 911 F.2d 522, 525 (11th Cir. 1990), cert. denied, 111 S. Ct. 765 (1991); *United States* v. *Strickland*, 902 F.2d 937, 940 (11th Cir. 1990). Accord *United States* v. *Pino*, 855 F.2d 357, 361 (1988) (distinguishing the Eleventh Circuit's decision in *Smith* and leaving open the question whether "if there is adequate reason for a stop based on a traffic violation, it is necessary that it also be shown that this was in fact the reason for the stop"), amended, 866 F.2d 147 (6th Cir. 1989), cert. denied, 110 S. Ct. 1160 (1990); cf. *United States* v. *Crotinger*, No. 90-5990 (6th Cir. Mar. 15, 1991), slip op. 5-6 (citing *Pino* and distinguishing the Eleventh Circuit's decision in *Smith* on its facts).

[9] The court was unable to apply that test to the record before it because there was no information regarding "general police practice" with respect to the traffic stop at issue. 864 F.2d at 1518. The court went on to hold that even assuming the stop was valid, the evidence in question had to be suppressed because the stop was too long and the ensuing search was unreasonably extensive. *Id.* at 1518-1520.

on the record in this case. The officers who arrested petitioner knew that his driver's license was suspended. They stopped him only after seeing him driving at 1:15 a.m. and arrested him only after he informed them that he could not produce a valid driver's license. As the court of appeals noted, "[w]hile the officers may have been assigned to a tactical unit involved in gang activity, there is nothing in the record to indicate that they were not authorized to effect a custodial arrest for a traffic violation." Pet. App. 5a. Moreover, there is nothing in the record to indicate that a reasonable officer would have ignored the fact that petitioner was driving in the middle of the night while his license was suspended.[10] Instead, a common-sense approach to police practice suggests that a reasonable officer would have arrested petitioner under the circumstances.

Given those facts, petitioner's pretext claim would not have fared any better in the Tenth Circuit than it fared in the Seventh. See *United States* v. *Neu*, 879 F.2d 805, 808 (10th Cir. 1989) (rejecting pretext claim where a reasonable officer would have made a traffic stop after the defendant abruptly slowed down while being followed); *United States* v. *Erwin*, 875 F.2d 268, 272 (10th Cir. 1989) ("a reasonable New Mexico patrol officer routinely would have stopped a vehicle traveling twelve miles over the speed limit even

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[10] We note that the record on these issues was not developed in the district court, and the district court made no findings on the pretext issue, because petitioner failed to raise that claim in his motion to suppress. See Gov't C.A. Br. 11 n.4. Nor did petitioner even make a sufficient showing in his suppression motion to justify a hearing on the probable-cause claim that he did raise. See note 4, *supra*. Even though the court of appeals addressed petitioner's pretext claim, his failure to raise it in the trial court argues against review by this Court. See Fed. R. Crim. P. 12(f); *Yakus* v. *United States*, 321 U.S. 414, 444 (1944); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239 (1940); *Segurola* v. *United States*, 275 U.S. 106, 111-112 (1927).

in the absence of the alleged illicit motive"); *United States* v. *Rivera*, 867 F.2d 1261, 1263-1264 (10th Cir. 1989) (rejecting claim that traffic stop leading to drug seizure was pretextual because state police had "working arrangements" with Federal Drug Enforcement Agency and had previously made similar stops and seizures).[11]

2. Petitioner next argues (Pet. 36-54) that the burglary to which he pleaded guilty in 1975 did not culminate in a "conviction" within the meaning of 18 U.S.C. 921(a)(20) and therefore did not qualify as a predicate conviction for purposes of enhanced sentencing under 18 U.S.C. 924(e)(1). That contention does not warrant review for several reasons.

First, the issue whether petitioner's 1975 burglary was a "conviction" for sentencing purposes is governed by Illinois law.[12] This Court has "a settled and firm policy of deferring to the regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 395 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); cf. *Salve*

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[11] The validity of petitioner's arrest is also suggested by Eleventh Circuit cases rejecting claims that particular stops based on reasonable suspicion were pretextual. See *United States* v. *Hardy*, 855 F.2d 753, 756-757 (11th Cir. 1988) (rejecting claim that traffic stop leading to drug seizure was pretextual because state trooper had participated in program targeting narcotics "mules" on same interstate highway), cert. denied, 489 U.S. 1019 (1989); *United States* v. *Wilson*, 853 F.2d 869, 876 n.9 (11th Cir. 1988) (an officer's suspicion that the defendant may have possessed narcotics does not necessarily mean that his arrest on an unrelated offense was pretextual), cert. denied, 488 U.S. 1041 (1989).

[12] The Armed Career Criminal Act, 18 U.S.C. 924(e), applies where the defendant has convictions for three prior "crime[s] punishable by imprisonment for a term exceeding one year." The quoted phrase is defined in 18 U.S.C. 921(a)(20), which states: "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held."

Regina College v. *Russell*, No. 89-1629 (Mar. 20, 1991), slip op. 9-10 n.3.

Second, the state law question raised by petitioner lacks continuing importance. The Illinois Dangerous Drug Abuse Act, pursuant to which petitioner was sentenced in 1975, was systematically repealed between 1974 and 1984.[13] Few future federal sentences are likely to involve the question whether sentences under that Act constitute convictions.

Third, the court of appeals correctly held that petitioner was convicted under Illinois law when he pleaded guilty to burglary in the 1975 proceedings and was sentenced to a drug rehabilitation program. Pet. App. 11a-12a. Illinois law defines "conviction" as "a judgment of conviction or sentence entered upon a plea of guilty." Ill. Rev. Stat., ch. 38, para. 2-5 (1962); Ill. Rev. Stat., ch. 38, para. 1005-1-5 (1973). As the state court statement of conviction indicated, petitioner pleaded guilty and was sentenced to a drug rehabilitation program.[14] The Illinois Dangerous Drug Abuse Act recognizes that a court may sentence an addict "convicted of a crime" to drug treatment as an alternative to probation. Ill. Rev. Stat., ch. 91 1/2, para. 120.8 (1973). Consequently, the fact that petitioner was sentenced under that Act is fully consistent with the conclusion that he was convicted.

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[13] See 1974 Ill. Laws 62, § 2, eff. June 27, 1974; 1975 Ill. Laws 1667, § 59, eff. Mar. 4, 1975; 1976 Ill. Laws 1731, § 9, eff. Sept. 3, 1976; 1984 Ill. Laws 6536, Art. VI, § 57, eff. July 1, 1984; 1984 Ill. Laws 1983, Art. II, § 95, eff. Sept. 11, 1984. Illinois provisions for treatment alternatives for drug addicts and alcoholics who are charged with or convicted of crimes now appear at Ill. Rev. Stat., ch. 111-1/2, paras. 6360-1 and 6360-2 (1989).

[14] The court of appeals specifically found that the state court record accurately reflected the disposition of petitioner's case. Pet. App. 10a n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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